

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

3 Thorndike Properties, Inc.,

4 Plaintiff

5 v.

6 Simon Harkins, Stuart Docherty, and Fitness  
7 Operations Ltd,

8 Defendants

Case No.: 2:16-cv-02488-JAD-VCF

**Order Denying Without Prejudice  
Plaintiff's Motions for Entry of Default  
Judgment**

[ECF Nos. 11, 23, 24]

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10 Plaintiff Thorndike Properties, Inc. leased storefront to the defendants so that they could run  
11 a fitness club. Several years into the lease, the defendants stopped paying their rent so Thorndike  
12 brought this breach-of-lease case against them. The defendants failed to respond, the Clerk of Court  
13 entered a default against them, and Thorndike now seeks a default judgment.

14 The problem with Thorndike's motion is its request for money damages. Courts normally  
15 take a plaintiff's factual allegations at face value once a default is filed—but not for damages.  
16 Plaintiffs have an affirmative duty to prove any damages they seek, even at the default-judgment  
17 stage. And because awarding damages without the defendant's presence raises weighty due process  
18 concerns, courts have discretion to determine whether any requested money damages are reasonable.

19 Thorndike has failed to make that showing. It asks for 14 months of unpaid rent and almost  
20 \$200,000 in late fees—nearly double its actual losses—with little explanation or evidence suggesting  
21 that these requests are appropriate. What's more, the damages it asks for now do not mirror the  
22 relief it sought in its complaint, which violates the Federal Rules of Civil procedure. I thus deny its  
23 motion without prejudice.

24 **Background**

25 In 2012, Thorndike leased Simon Harkins a storefront in Henderson, Nevada so that he could  
26 start a gym.<sup>1</sup> The lease is for five years and set to end in March 2017.<sup>2</sup> It has a late-rent provision  
27 that levies a fee of 20% for each day the rent is not received, and an attorney's fees provision that

28 <sup>1</sup> ECF No. 1 at 3.

<sup>2</sup> ECF No. *id.*

1 requires the lessee to pay for Thorndike's legal fees related to enforcement of the lease.<sup>3</sup>

2 Harkins paid his rent for the first two years until he assigned his lease to a new company and  
3 owner: Fitness Operations Ltd. and Stuart Docherty. Under the parties' new written assignment,  
4 Harkins, Docherty, and Fitness Operations were all subject to the lease going forward.<sup>4</sup> But  
5 apparently the change in personnel was not helpful, because the defendants stopped paying their rent  
6 in May of 2015.<sup>5</sup>

7 Thorndike contends that it is entitled to unpaid rent for the 14 months left on the lease, the  
8 20% per-day late fee, and attorney's fees and costs—for a total of \$307,863.59. Thorndike's  
9 complaint alleges that the monthly rent after the parties' assignment was \$5,756.54. But its motion  
10 for default judgment alleges that the rent was \$6,722.70.<sup>6</sup> Its damages calculations rely on the higher  
11 number.

12 Thorndike initially moved for default judgment against the two individual defendants.<sup>7</sup> After  
13 it served Fitness Operations, Thorndike filed a second motion for default judgment against Fitness  
14 Operations.<sup>8</sup> In this second motion, Thorndike raised for the first time its claim that it is owed  
15 almost \$200,000 in late-fee penalties on top of the unpaid rent.

### 16 Discussion

17 Federal Rule of Civil Procedure 55 provides a mechanism for obtaining a default judgment  
18 against a party who has failed to respond to claims brought against it. A district court has discretion  
19 to enter a default judgment, which typically turns on the consideration of the seven *Eitel* factors: (1)  
20 potential prejudice to the plaintiff; (2) the merits of the plaintiff's substantive claim; (3) the  
21 sufficiency of the complaint; (4) the amount of money at stake in the action; (5) the potential  
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23 <sup>3</sup> ECF No. 12 at 7–8.

24 <sup>4</sup> ECF No. 1 at 3.

25 <sup>5</sup> *Id.*

26 <sup>6</sup> ECF No. 23 at 4.

27 <sup>7</sup> ECF No. 11.

28 <sup>8</sup> ECF No. 23.

1 disputes as to material facts; (6) whether the default was due to excusable neglect; and (7) the strong  
2 federal policy favoring adjudications on the merits.<sup>9</sup>

3 Although I generally accept Thorndike's factual allegations as true when considering these  
4 factors, this is not the case for its damages claim. When a plaintiff seeks a default judgment for  
5 damages, it must prove up its damages figures with specific evidence.<sup>10</sup> Because of the due process  
6 concerns raised by ex parte damages judgments, courts have discretion when determining whether  
7 and how much damages to award on default judgment.<sup>11</sup> When determining what's appropriate,  
8 courts consider "whether the recovery sought is proportional to the harm caused by defendant's  
9 conduct."<sup>12</sup> For example, courts may consider whether a plaintiff reasonably attempted to mitigate  
10 its damages and whether any asserted liquidated damages claims are reasonable.<sup>13</sup> These factors are  
11 especially relevant here given that Nevada law generally requires (1) landlords to mitigate damages  
12 from a breached lease and (2) that liquidated-damages provisions be reasonable under the  
13 circumstances.<sup>14</sup>

14 Thorndike seeks over \$300,000 in damages for a single breached lease, with little explanation  
15 of why that figure is reasonable. It stopped receiving rent in May of 2015; why didn't it try to let the  
16 store to a new tenant? More concerning, Thorndike alleges that this loss of rent caused it a little over  
17 \$100,000 in damages, but it now seeks more than 150% of its actual damages in additional penalties  
18 under the lease, for a total of \$293,923.80 in damages. Thorndike has not even attempted to explain  
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20 <sup>9</sup> *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986).

21 <sup>10</sup> *Philip Morris USA, Inc. v. Castworld Prods., Inc.*, 219 F.R.D. 494, 501 (C.D. Cal. 2003); *Geddes*  
22 *v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977) (stating the general rule of law that  
allegations of complaint are not accepted as true for damages awards).

23 <sup>11</sup> *Rolex Watch, U.S.A., Inc. v. Michel Co.*, 179 F.3d 704, 712 (9th Cir.1999).

24 <sup>12</sup> *Landstar Ranger, Inc. v. Parth Enters.*, 725 F. Supp. 2d 916, 921 (C.D. Cal.2010).

25 <sup>13</sup> *See, e.g., Universal City Studios Int'l B.V. v. Entm't Television Network FZE*, 2009 WL 10671946,  
26 at \*7 (C.D. Cal. Dec. 16, 2009) (acknowledging that plaintiff might not need to prove mitigation to  
27 win on the merits in a default judgment claim, but that mitigation was a relevant factor at the  
damages stage).

28 <sup>14</sup> *Mason v. Fakhimi*, 865 P.2d 333, 335 (Nev. 1993); *Dillard Dep't Stores, Inc. v. Beckwith*, 989  
P.2d 882, 886 (Nev. 1999).

1 how a penalty of nearly double its actual damages could possibly be “proportional” to the harm it  
2 suffered here.

3 Finally, Thorndike’s complaint and its request for damages are out of sync, which is another  
4 reason to deny its motion. The damages sought in a motion for default judgment cannot “differ in  
5 kind from, or exceed in amount, what is demanded in the pleadings.”<sup>15</sup> Thorndike’s complaint  
6 requests a total of \$78,576.88, a paltry sum compared to the \$300,000-plus that it asks for now.

7 I therefore find that Thorndike’s motion lacks the level of proof necessary to justify the  
8 damages it requests, so I deny its motion. Should it file a renewed motion for default judgment,  
9 Thorndike is cautioned that failure to include properly authenticated support and explanation for the  
10 requested damages amount will result in the continued denial of its motion.

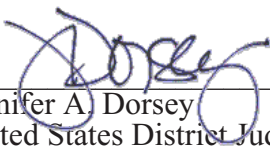
### 11 Conclusion

12 Accordingly, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff’s  
13 motions for default judgment [ECF Nos. 11, 23] are **DENIED** without prejudice.

14 IT IS FURTHER ORDERED that the plaintiff’s motion to amend [ECF No. 24] is **DENIED**  
15 **as moot.**

16 The Clerk of Court is directed to VACATE the 9/15/17 hearing.

17 Dated this 4<sup>th</sup> day of August, 2017.

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20 Jennifer A. Dorsey  
United States District Judge

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<sup>15</sup> *Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977).